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SUMMARY RECORD OF THE 36th MEETING

Chairman:	Mr. ESCOVAR-SALOM	(Venezuela)
later:	Ms. WONG (Vice-Chairman)	(New Zealand)
later:	Mr. ESCOVAR-SALOM (Chairman)	(Venezuela)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

1. Mr. LEANZA (Italy), referring to chapter III of the report of the International Law Commission (A/51/10 and Corr.1), said that all legal systems provided for the attribution of responsibility when the conduct of States adversely affected the rights and interests of other States. It could therefore be affirmed that State responsibility was the basic regulatory mechanism in international relations. Nevertheless, the legal regime governing State responsibility had coalesced very slowly. The work of the International Law Commission on the topic was therefore of considerable importance. In completing the first reading of the draft articles on State responsibility, the Commission had crossed an important threshold in the codification of rules on the subject and made a significant contribution to the United Nations Decade of International Law.

2. His delegation wished to focus its comments on the new articles adopted by the Commission at its recent session, namely, article 42, paragraph 3, on reparation, articles 47 and 48 on countermeasures and articles 51 to 53 on the consequences of an international crime.

3. His delegation fully endorsed the wording of article 42, paragraph 3. Although the provision that reparation of the consequences of a wrongful act must not result in depriving the population of a State of its own means of subsistence could not be considered to be part of customary international law, it embodied the general rule of international law concerning the obligation to make adequate reparation.

4. His delegation also supported the inclusion of the articles on countermeasures, in the draft, despite the opposition of some members of the Commission. There could be no doubt that, in accordance with international law and practice, if a State violated its legal obligations towards another State, that State was entitled to abrogate its legal obligations towards the first State. The main legal problem with regard to countermeasures was precisely their "threshold of legitimacy", in other words, the circumstances in which countermeasures represented a legitimate response to wrongful conduct on the part of another State. In order to determine that threshold, two avenues had been explored, focusing on the goal and the degree of countermeasures, respectively.

5. In terms of the first approach, State practice unquestionably showed that, in resorting to countermeasures, the injured State could seek either the cessation of the wrongful conduct or reparation in the broad sense; it could not, however, take countermeasures as a means of inflicting punishment. As to the second approach, the principle of proportionality was reflected in State practice.

6. The Commission, however, had not confined itself to codifying the aforesaid practice, but had also dealt with the thorny issue of the relationship between recourse to certain dispute settlement procedures and the taking of countermeasures. The Commission had endeavoured to give priority to the principle of the peaceful settlement of disputes without impairing the effectiveness of the countermeasures to be adopted by an injured State. Thus, the Commission had imposed on both the injured State and the wrongdoing State an obligation to negotiate before countermeasures were taken, and had also provided for the suspension of countermeasures where the wrongdoing State engaged in good faith in a binding dispute settlement procedure.

7. With regard to the draft articles on the consequences of an international crime, the notion of an international crime committed by a State continued to arouse controversy. In particular, it was feared that situations could arise in which any State or group of States might feel entitled to impose sanctions unilaterally, thereby undermining the foundations of the international legal order, such as the prohibition against the use of force and the principle nullum crimen sine lege. Other objections related to the difficulty of attributing criminal responsibility to a State and to the non-existence of international organs exercising criminal jurisdiction and carrying out prosecutorial functions. Those objections, however, were not insurmountable, especially considering that the international system had its own characteristics which did not fall within the categories of national law. It was therefore unlikely that the concept of an international crime could imply any kind of criminal responsibility on the part of a State.

8. His delegation believed that it was important to retain the term "international crime". The concept of an international crime, which was not strictly identical to the notion of criminal responsibility in national law, indicated clearly that the violation of the legal and moral obligations essential to the peace, survival and prosperity of the international community was considered to be on a par with the most serious criminal offences punishable under national law.

9. The Commission had endorsed the point of view upheld by the Special Rapporteur for several years, namely, that special consequences must attach to international crimes as opposed to other wrongful acts; otherwise the distinction would be meaningless. Hence, the consequences of international crimes should include not only remedies typically provided by civil law, such as cessation of the wrongful act, restitution in kind, monetary compensation and satisfaction, but also those characteristic of public law.

10. In that connection, his delegation could not agree to the deletion of the portion of the text dealing with the institutional consequences of international crimes, which would entail a two-stage procedure, consisting of, first, a political assessment of the situation by the General Assembly or the Security Council and, second, a decision by the International Court of Justice as to whether an international crime had been committed. Such a system would make maximum use of the potential offered by the United Nations system, ensure respect for the jurisdiction of the competent bodies and meet the need for a rapid response to an international crime. The consequences of an international crime were an integral part of the law on State responsibility and, as such,

should be dealt with in the draft articles from the standpoint of both lex ferenda and lex lata. Above all, they must not be relegated to the category of political action by the Security Council with a view to the maintenance of international peace and security.

11. Mr. HE Qizhi (China) said that the articles in part one and in chapters I, II and IV of part two of the draft contained a fairly comprehensive statement of the origin, content, forms and degrees of international responsibility attributable to a State. While some of the concepts required further elaboration, the draft articles generally reflected international practice and the main theoretical elements of international law. His delegation doubted, however, whether the provisions relating to dispute settlement and to countermeasures should be incorporated into the draft articles.

12. While the peaceful settlement of international disputes was a fundamental principle of international law, it was not essential to the regime of State responsibility. There was no reason to reiterate in the draft articles the dispute settlement provisions contained in the Charter of the United Nations and other international instruments. Furthermore, the dispute settlement procedures provided for in part three did not include judicial settlement by the International Court of Justice and were therefore incomplete.

13. In addition, the compulsory arbitral procedure provided for in article 58, and the provisions of article 60 relating to the validity of an arbitral award, could also give rise to controversy.

14. Article 58, paragraph 2, provided that the State which had committed a wrongful act was entitled at any time unilaterally to submit the dispute to arbitration when countermeasures were taken against it by the injured State. While the purpose of that provision was to restrain the injured State from taking countermeasures and to prevent further disputes from arising between the parties, it ran counter to the principle of international law that arbitration should have the consent of all the parties to a dispute.

15. Article 60, paragraph 2, posed similar problems. While the parties concerned might agree to submit the dispute to arbitration, that did not mean that if there was no partial or total settlement of the dispute, either party should be compelled to accept one or more further compulsory arbitration procedures.

16. While different legal systems contained varying provisions concerning the validity of an arbitral award, no existing international instrument or customary practice envisaged the possibility that an arbitral award in an international dispute would not be implemented as a result of objections raised by one party to the dispute. Moreover, the International Court of Justice had not been given jurisdiction to confirm the validity of an award or to invalidate it in whole or in part, yet article 60, paragraph 2, provided that the Court could, upon the request of any party, decide on the validity of an award.

17. His delegation therefore proposed that part three of the draft articles should be deleted. If it was deemed necessary to retain some provisions on dispute settlement, consideration could be given to inserting a separate article

in the chapter on countermeasures, reiterating the provisions of Article 33 of the Charter.

18. His delegation was also of the view that, while the content of the chapter on countermeasures had no logical relationship to part two, in which it was situated, it was closely linked to the notion of an internationally wrongful act committed by a State, since countermeasures were usually taken in response to such acts. The Chinese delegation therefore suggested that the draft articles on countermeasures should constitute a new part three.

19. The crux of the controversy over the concept of an international crime committed by a State was whether a State could commit a crime and, if so, what the differences were between the legal consequences of a crime and of a delict. As his delegation did not believe that criminal-law penalties were applicable to States, it would be difficult to make that distinction. China suggested that, on second reading, the Commission should pay closer attention to the practicability of the concept of State crimes. The proposal by some members of the Commission to replace the expression "international crimes committed by a State" with "exceptionally serious wrongful acts of a State" deserved support.

20. Draft article 39 (Relationship to the Charter of the United Nations) provided that States parties to the future convention were subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security. As explained by the Commission in its commentary on the draft article, many members of the Commission had been apprehensive that a State's rights or obligations under the convention could be overridden by decisions of the Security Council taken under Chapter VII of the Charter which, under Article 25 of the Charter, Member States were bound to carry out

21. In his delegation's view, article 39, and the explanation given by the Commission, would give rise to controversy, because Article 103 of the Charter stipulated clearly that Charter provisions prevailed over those of any other international legal instrument. It would therefore be preferable to delete at least the words "as appropriate", if not the entire article.

22. Lastly, the title "State responsibility" was inappropriate, as the draft articles dealt only with the general principles of State responsibility for internationally wrongful acts and did not include such topics as international liability for injurious consequences arising out of acts not prohibited by international law. His delegation therefore suggested that the title should be revised on second reading so as to better reflect the actual content of the draft articles.

23. Mr. PERRIN de BRICHAMBAUT (France) said that his delegation had explained at previous sessions why it opposed the draft articles on State responsibility. Unfortunately, those criticisms and fears remained valid. The text as a whole lacked consistency, no doubt because it was the work of several Special Rapporteurs, and raised various theoretical and practical problems, particularly with regard to the distinction between international crimes and international delicts, countermeasures and settlement of disputes. His delegation believed that, if it was to be made acceptable, part one of the draft articles would need

to be drastically amended. Part two was very weak and not linked closely enough to part one. Part three was unrealistic and ineffective.

24. A serious difficulty arose as early in the text as article 1. In his delegation's view, it was the damage that entailed responsibility, not a breach of obligations that were in any case ill-defined in the draft articles. That approach from the standpoint of damage must be reflected from the very start of the draft articles.

25. As for the distinction between international crimes and international delicts, his delegation did not dispute that some internationally wrongful acts were more serious than others, but considered that the distinction was still too vague. The wording of article 19, paragraph 2, was imprecise; he wondered what would determine the "essential" character of the obligation in question, and what was meant by the "international community". Such legal imprecision was unacceptable in a text of that type. As for delicts, they were simply not defined, but merely described (in paragraph 4) as any internationally wrongful act which was not an international crime in accordance with paragraph 2. Furthermore, the distinction between two categories of breach of international obligations was the result of a new, and unacceptable, trend towards "criminalization" in public international law. The very principle of a list of examples, such as that found in article 19, paragraph 3, was open to criticism in a codification exercise. Furthermore, that list was out of date and poorly drafted.

26. Article 19 appeared to be an illustration of jus cogens. If article 19, paragraph 2 was read in the light of articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, concerning jus cogens, the concept of an "international obligation so essential for the protection of fundamental interests of the international community" seemed roughly to correspond to the concept of a "peremptory norm of general international law", a concept that France contested for the same reasons that led it to reject the concept of an "international crime", namely, its lack of precision.

27. Turning to the consequences of internationally wrongful acts characterized as crimes, he said that one of the paradoxes or weaknesses of the draft articles was that they deduced practically no consequence from the concept of a crime. They tended to rank the concepts of crime and delict together, whether with respect to the internationally wrongful act or to reparation, whereas, at least from the standpoint of the Commission's own logic, they ought to have defined a regime specific to the crime. Some of the problems obviously stemmed from the confusion surrounding the concept of "crime" and the expression "injured State"; for, as the definition of a crime referred to the un-legal concept of the "international community", all States members of that international community could lay claim to be "injured States". That view was unsustainable. It would have been preferable to distinguish between directly injured States and those that were only indirectly injured, a distinction barely hinted at in article 40, paragraph 3.

28. Another fundamental question was that chapter III of part one raised a number of problems of compatibility with the Charter system. In article 19, paragraph 3 (a), the Commission ventured into the sphere of maintenance of

international peace and security. Yet, under the Charter, only the Security Council was empowered to determine the existence of a threat to the peace, breach of the peace or act of aggression. If the draft articles were one day to be adopted in the form of a convention, there was no doubt that, in the event of a conflict between the provisions of the convention and those of the Charter, the provisions of the Charter would prevail in accordance with article 103 thereof.

29. In short, his delegation's views on part one were that State responsibility was neither criminal nor civil, but simply sui generis. Any mechanical transposition of the concepts of internal law, particularly criminal law, would be an artificial, theoretical exercise. Secondly, in internal law, criminal justice presupposed a moral and social conscience, but it also presupposed a legislator empowered to define and punish offences, a judicial system to decide on the existence of an offence and the guilt of the accused, and a police to carry out the penalties handed down by a court. Yet no legislator, judge or police existed at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them. As for universal values, they were not sufficiently defined and recognized to justify the approach advocated by article 19.

30. The approach adopted in the draft articles with regard to countermeasures, recourse to which was legitimate but subject to certain conditions, was positive but not without its problems. Article 53, on obligations for all States, raised some difficulties, particularly if it was wished to avoid recourse to countermeasures in defence of what the draft articles called "fundamental interests of the international community". That raised the delicate question of the institutionalization of reprisals for the crime outside the context of the United Nations. Such a provision might imply recognition of what was known as actio popularis, a mechanism regarding which the practice of the International Court of Justice was not entirely settled. It would in any case be difficult to implement: only the Security Council, which had prime responsibility for maintenance of international peace and security under the Charter, could initiate an action of that type.

31. His delegation also had serious doubts as to whether part three was consistent with the provisions concerning countermeasures. Recourse to countermeasures must, as far as possible, be linked to a process of peaceful settlement of disputes. The inclusion in article 48 of an obligation to negotiate before resorting to countermeasures thus seemed to be a step in the right direction. In order to reconcile two mechanisms which appeared at first sight to be contradictory, it might be useful to draw on article XXIII of the General Agreement on Tariffs and Trade, which subtly linked a procedure for peaceful settlement of disputes with the adoption by one or more contracting parties of measures, justified in the light of the circumstances, vis-à-vis one or more other contracting parties.

32. The procedure for settlement of disputes envisaged in part three was lengthy and much too rigid. Furthermore, the provisions of article 58, paragraph 2, were debatable, for it was generally a negotiated compromise, not a unilateral request, that enabled a case to be submitted to an arbitral tribunal. Article 58 was also debatable at a more fundamental level, since it aimed at

establishing a sort of compulsory jurisdiction of the arbitral tribunal, along the lines of Article 36 of the Statute of the International Court of Justice, application of which was, however, optional. States could not be compelled to submit disputes to an arbitral tribunal; that was contrary to the very principles of arbitration, which were based on the free will of States. Nor was the compulsory competence of the International Court of Justice established under article 60 acceptable, or in accordance with its Statute: settlement of disputes by a court was and must remain optional.

33. It was understandable that some members of the Commission wished to see an increasingly integrated and organized international society. Those praiseworthy desires must however be set against reality. One possible means of reconciling them might be to make part three indicative, by giving it the form of an optional protocol.

34. Mrs. HOUMMANE (Morocco), speaking first on the draft Code of Crimes against the Peace and Security of Mankind, said that her delegation wished to see the early adoption of the draft Code, which could then serve as a source of criminal law for the future international criminal court. The draft statute for an international criminal court and the draft Code were two indispensable and closely linked legal instruments. Given that the rules they set forth were complementary, and that States parties to the Code would, ipso facto, be called upon to recognize the existence of an international criminal court, her delegation considered that the Commission should concentrate on drafting two harmonious and complementary texts of equal legal value, whether separate or incorporated.

35. On articles 8 and 9 of the draft Code, she said it would be virtually impossible for the future Court to prosecute and punish the countless individuals responsible for crimes under international law, but that that concern was met by the principle of complementarity of the jurisdiction of national courts and the international criminal court. However, the idea of giving national courts universal jurisdiction over the crimes set out in articles 17 to 20, irrespective of where or by whom those crimes were committed, was hard to accept. Articles 8 and 9 should be the subject of further study, with consideration given to the issue of State sovereignty, and particularly to the sovereign equality of States and the principle that a State did not extradite its own nationals. In her delegation's view, the State on whose territory the crime had been committed should have jurisdiction in the first instance. That of course presupposed that the State in question had taken the necessary steps to comply with that obligation, in accordance with international law.

36. Her delegation also noted with satisfaction that the Commission had decided to establish a working group to consider the question of wilful and severe damage to the environment. Inclusion of that crime in the draft Code, albeit in the restricted context of war crimes, was a service to humanity.

37. On the draft articles on State responsibility, she said that the distinction between international delicts and international crimes proposed in article 19 of the draft articles had a place in international law as well as in private law, in view of the proportional character of the offence and the legal

consequences deriving therefrom. The list of crimes contained in article 19 was limitative and any wrongful act not enumerated in that list was regarded as a delict. It bore noting, however, that not all the delicts entailing State responsibility were of the same degree of seriousness, particularly as they usually resulted from a breach of treaty law, and not of general law, as in the case of crimes. Some of those offences could therefore be dealt with bilaterally. Delicts could also result from a failure to act which was not necessarily malicious or automatic, such as delay by a State in repaying its external debt. More detailed consideration should therefore be given to the relativity of the concept of a delict in international law, and of its possible consequences in the light of recent developments in international law and international economic relations.

38. Her delegation continued to have reservations on the wisdom of including countermeasures in the draft articles, in the light of the principle whereby a State could not be the judge of its own rights. It shared the views expressed by those members of the Commission who had stressed the potential negative aspects of countermeasures, and, in particular, the unfairness that might result if they were applied between States of differing power or resources.

39. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the rapid development of activities with potentially harmful transboundary consequences made the need for regulation founded on international solidarity increasingly urgent. On the question whether the scope of the draft articles should be extended to include other activities not prohibited by international law that did not involve the risk of significant transboundary harm but that nevertheless caused such harm, her delegation considered that, at the current stage in the progressive development of international law, the draft articles should cover all situations that might entail the strict liability of States for lawful acts. A general definition of the activities covered, as contained in article 1, was satisfactory, since it would be difficult to list all the activities and substances to which the articles applied, not least because of the constant advances of science and the concomitant increase in lawful activities; and also because of the need progressively to eliminate certain chemical substances deemed to be harmful to the environment and to prohibit certain activities that were currently lawful, such as deforestation. With regard to the question of compensation, dealt with in article 5, the best means of remedying the harm caused to the environment would be restoration of the status quo ante.

40. On the topic of State succession and its impact on the nationality of natural and legal persons, her delegation supported the approach of dealing first with the question of natural persons, which was more urgent in view of the human problems it raised, and postponing consideration of the question of the nationality of legal persons, which raised problems of an economic order.

41. On the topic of reservations to treaties, she noted that some jurists had seen reservations as a unilateral limitation on the part of a contracting State of the obligations set forth in a treaty, or as a sort of alteration of the content of the consent; whereas others saw them as an attribute of the sovereignty of the State. Reservations posed a dilemma: if they were not permitted, very few States would be willing to accede to treaties; on the other

hand, too much freedom to enter reservations would permit each State to rewrite treaties to suit its own purposes, thereby compromising their legal integrity. A proper balance must be struck. That was the criterion that had been adopted in the Vienna Convention on the Law of Treaties, which allowed for the entering of reservations provided they were neither prohibited by the treaty in question nor incompatible with the object and purpose of the treaty. Her delegation supported preservation of the achievements of the relevant provisions of the law of treaties and the flexibility of the regime those provisions had introduced. It endorsed the Special Rapporteur's conclusion that there were three elements enabling the system to be applied in a satisfactory manner to all treaties, whatever their object; and considered that there was no reason to favour a proliferation of the regimes applicable in the light of the object of the legal instrument in question.

42. Mr. CANDIOTI (Argentina) said that the codification of State responsibility was a fundamental alternative to the use of force as a method of settling disputes between States and offered the best guarantee for international peace and security. His delegation supported the Commission's decision to include countermeasures in the regime of State responsibility, even though the purpose of the regime was to avoid unilateral action. Countermeasures provided an effective basis for balancing the conflicting interests of the injured State and the wrongdoing State. Without them, the injured State could find itself unable to bring about the cessation of wrongful acts in a timely manner, and could turn out to be the main victim of a decentralized system of international sanctions. Nevertheless, countermeasures needed to be properly regulated in order to avoid abuse of the international system by the strongest States. His delegation therefore supported the general guidelines set out in article 47 of the draft. He also welcomed the inclusion in article 47 of a clause to safeguard the rights of third States, by relying on one of the essential characteristics of countermeasures, namely, that the unlawful character of conduct resorted to by way of countermeasures was precluded only as between the injured State and the wrongdoing State.

43. Draft article 48 reflected the principle of the peaceful settlement of disputes, as laid down in the Charter of the United Nations, and specifically established that the entitlement to take countermeasures did not exempt States from the general obligation to negotiate. It also offered the wrongdoing State the possibility of submitting to a binding arbitration process, a remedy that perhaps did not take sufficiently into account the nature of the countermeasures and the relevant political context. States were generally reluctant to submit to systems of compulsory jurisdiction, and communication between States tended to be so poor when a dispute was serious enough to merit countermeasures that States were even less willing to submit to a binding settlement through a third party. He therefore thought that article 48 should be revised to make it more flexible.

44. Whatever the outcome of the debate on the distinction between international crimes and international delicts, the essential difference to be borne in mind was that, generally speaking, every internationally wrongful act provoked a reaction from the injured State, whereas the violation of the essential norms of peaceful coexistence among nations was of concern to the whole of the international community. That difference meant that there would be different

consequences for crimes and delicts. His delegation supported the Commission's basic approach to the problem, while recognizing that further elaboration would be necessary to achieve a widely acceptable formulation. However, he did not believe that the distinction should be imposed on the procedures for the settlement of disputes, where excessive rigidity and complexity would undermine wide acceptance of the draft articles.

45. Mr. AL-KHASAWNEH (Jordan) said that it was argued that the differences, as presented in the draft articles, between the consequences of international crimes and those of international delicts appeared so slight that they did not justify the distinction drawn between them in article 19. However, that was a reflection of political realities rather than of the inability of the international community to build a more rigorous regime characterized by centralized coordination on the part of the international community and judicial control over the responses to the commission of international crimes. Any attempt to coordinate the instrumental consequences of international crimes would inevitably bring into sharp focus the inherent tensions between the law of State responsibility and that of international peace and security, where freedom of action was so jealously guarded.

46. Nevertheless, article 19 should not be forsaken without taking into account certain considerations. Firstly, the decision to deal with crimes in the draft rested ultimately on the moral consideration that the traditional remedies of State responsibility were inadequate to deal with exceptionally serious breaches. Secondly, offending States were already subjected at times to consequences more severe than those envisaged in the draft articles, but without any form of judicial control; crimes had been included in the draft in order to spare civilian populations the worst excesses that resulted from the imposition of consequences without judicial control or review. Thirdly, the law of State responsibility should not encroach on the realm of the law of international peace and security, and vice versa.

47. The concept of proportionality gave the false impression that there was already a substantive limitation on the use of countermeasures. Given the complexity of international relations, a more detailed elaboration of the areas where countermeasures were prohibited was necessary. Moreover, the concept of interim measures should be clearly delineated to prevent States from using interim measures in the place of countermeasures stricto sensu.

48. He was concerned that the procedure for the third-party settlement of disputes in the taking of countermeasures would actually encourage States to resort to countermeasures, and disadvantage those States not resorting to them, since arbitration could only be sought, according to the draft articles, if countermeasures had been taken. That was tantamount to punishing the diligent State.

49. The substantive rules in the current draft were likely to give rise to disputes as to their implementation, but that was to some extent inevitable given the wide scope of the draft. His delegation believed that a more rigorous regime for the third party settlement of disputes was necessary. An effective procedure for the settlement of disputes would be in the interest of small

States, and would not be an impediment to the wide acceptability of the draft articles.

50. State responsibility was a topic of central importance in international law and international relations. Many of the problems encountered during the elaboration of the draft were attributable to the incompatibility of the logic of power and the logic of justice, which it was the Sixth Committee's duty to try to reconcile.

51. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

52. Mr. NAKAMURA (Japan) said that the draft articles on State responsibility would provide an excellent resource and guide for the development of international law in that area. His delegation firmly believed that, since State responsibility was integral to the very foundation of international law, the codification and progressive development of law in that area would greatly contribute to the progress of the rule of law in international society. Nevertheless, further debate was necessary in some areas, such as the treatment of international crimes, the concept of countermeasures, the scope of reparation and dispute settlement procedures.

53. Mr. DE SARAM (Sri Lanka) said it was important to bear in mind that the rules of State responsibility were secondary rules to be brought into operation only when a primary obligation between States was breached, and as such should be kept entirely separate from the area of primary obligations. It was therefore inappropriate to include State crimes, which belonged to the area of primary obligations, in the secondary rules of State responsibility, the overall objective of which was not to provide a platform for moral condemnation but to provide compensation for material losses.

54. He also had doubts as to the desirability of including the settlement of disputes in the secondary rules on State responsibility. It was unlikely that a dispute would arise between States on the secondary rules of State responsibility in circumstances unrelated to any dispute relating to primary obligations; however, an appropriate dispute settlement procedure could be included in an optional protocol. The logistical and financial burden resulting from use of the dispute settlement procedure proposed in the draft articles would be too great for many smaller States. He would therefore prefer to retain the flexibility of the dispute settlement procedures currently available to States when a breach of primary obligations was involved.

55. Article 30 of part one of the draft articles, on countermeasures, would legitimize an internationally wrongful act on the part of a State which believed itself to be "injured" by the internationally wrongful act of another State. The countermeasures concerned, which did not include armed force, were clearly designed to pressure an alleged wrongdoing State into acknowledging its wrong, providing compensation or agreeing to proceed to a binding dispute settlement procedure; in other words, they clearly came within the realm of dispute settlement in its broadest sense. The definition of an internationally wrongful act in article 30 seemed inappropriate in the discussion of secondary rules, which had nothing to do with whether or not a primary obligation had been fulfilled. Moreover, the proposed countermeasures would not be conducive to the

observance of the rules of law. In fact, it seemed that in its discussion of article 30 the Commission had strayed from its focus on the secondary rules of State responsibility to consideration of primary obligations and whether or not the acts of a State should form the basis for a particular countermeasure.

56. In view of the scope and significance of the topic, a number of additional issues should be addressed in informal consultations prior to the adoption of a resolution by the Sixth Committee, including the determination of an adequate time-period for the preparation of comments by Governments; whether Governments should submit their preliminary observations on general aspects and offer more detailed comments later; whether a time-period should be established for the Commission to complete its second reading; whether procedures should be established for a continuing exchange of views between the Commission, the Sixth Committee and Governments during the preparation of the draft articles; whether the Committee should be making suggestions to the Commission concerning the text and commentary; how to record what the Commission clearly considered existing law and what it did not; and whether, in its draft articles, the Commission should propose alternative formulations on troublesome issues where a consensus had not been achieved.

57. The Committee should delay its final decision on the form the final draft articles on State responsibility should take. He believed that an international treaty would be more effective than a declaration of the General Assembly.

58. Mr. KAMTO (Cameroon) said that he welcomed the distinction drawn between international crimes and international delicts. At the international level, the greatest challenge would be to determine the consequences of violations according to their seriousness. The fact that the draft articles did not prescribe consequences in the case of delicts suggested one of two things: either that there were none or that they were part of the ordinary law of States; that should be spelled out clearly in the draft articles. Referring to article 52, which removed the limitations set forth in article 43, subparagraphs (c) and (d), he said that the purpose of the draft articles would be defeated if the reparation in kind claimed by the victim State undermined the political independence and economic stability of the State which had committed the crime. Noting that the question of actio popularis of the injured State remained unsolved, he said that the consequences of the distinction between international delicts and international crimes must be examined further.

59. The draft articles on countermeasures were, on the whole, more balanced and less intimidating for less powerful States. His delegation welcomed the fact that the Commission had managed to contain the risks involved in the implementation of countermeasures for which rules had not yet been firmly established. In that connection, articles 48, 49 and 50 seemed to have been drafted in the right spirit and would probably dispel the legitimate doubts of new States. Elimination of either the procedure for the settlement of disputes over countermeasures referred to in article 48 or the countermeasures listed in article 50 would impair the machinery and make it unacceptable to many States. The words "economic" and "political" in article 50, subparagraph (b), should be deleted so as to broaden the scope of the "coercion".

60. The comprehensive mechanisms outlined in articles 54 to 60 were too complicated and costly. In the non-judicial phase of the settlement, the parties should be able to move directly from unsuccessful negotiations or conciliation to arbitration, recourse to good offices and mediation being at the discretion of the parties.

61. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he said that he had reservations about reducing the number of categories of crimes covered by the draft Code from 12 to 5, particularly since such a limitation would not necessarily guarantee universal acceptance. Under the principle of nullum crimen sine lege, the number of individual acts covered by the draft Code would be reduced. Article 1 should not contain an exhaustive list of all crimes against the peace and security of mankind, but the draft Code must provide a specific definition of the concept. That might be accomplished by inserting another paragraph in article 1, stating that crimes which were not mentioned were still considered crimes against the peace and security of mankind and were punishable as such.

62. His delegation also had reservations about including crimes against United Nations and associated personnel (article 19) in the draft Code when such major crimes as terrorism and the threat of aggression were left out. Attacks on United Nations staff members must be dealt with in the larger context of guaranteeing the security of peacekeeping operations on the ground; that was beyond the scope of the draft Code.

63. Under the principle nulla poena sine lege, draft article 3 should be more precise, at least as to the nature of the penalty.

64. His delegation welcomed the inclusion of the crime of aggression, whether by a State or a group, in the draft Code, and the expansion of the category of war crimes. The nature of the crimes dealt with in articles 16, 17 and 18, however, must be determined. As the Commission acknowledged in its commentary to article 16, only States, and not individuals, were capable of committing aggression; draft article 16 should therefore be entitled "Initiation of and/or participation in the crime of aggression".

65. His delegation welcomed the fact that the Sixth Committee's consideration of the draft Code coincided with the work of the Preparatory Committee on the Establishment of an International Criminal Court. It was a sign that the international community felt compelled to preserve peace and security in the world. The crimes should be simply mentioned in the draft Statute of the court, which was a procedural instrument, and defined in the draft Code. The Committee should not take action on the draft Code until the Preparatory Committee harmonized the draft Code and the draft Statute.

66. Mr. Escovar-Salam (Venezuela) resumed the Chair.

67. Mr. ZAIMOV (Bulgaria) said that his delegation endorsed draft article 19, which distinguished between international crimes and international delicts. That distinction must be based on the seriousness of the consequences and the extent of material, legal and moral injury caused to other States and to the international community. State responsibility was not criminal but it was

international in nature, triggered by factual occurrences. His delegation therefore welcomed the inclusion of the note to draft article 40, concerning alternatives to the term "international crime". On the basis of its position that the legal consequences of an international crime went beyond the consequences of ordinary wrongful acts, his delegation believed that the draft text should be further refined on second reading. In particular, article 52, on the specific consequences of international crimes, should be expanded to include instrumental consequences.

68. With respect to the concept of "injured State", he agreed that directly and indirectly affected States should have different entitlements regarding the substantive and instrumental consequences of a crime.

69. Concerning countermeasures, his delegation also agreed that all States were entitled to take immediate measures to obtain cessation of a wrongful act and avoid irreparable damage but that only the most directly concerned States should be able to take urgent interim measures. In that connection, it welcomed the careful balance the Commission had managed to strike between the rights and interests of injured States and of States which were the object of countermeasures. It welcomed, in particular, the list of prohibited countermeasures in article 50. During the second reading, the preconditions for the lawfulness of countermeasures must be reassessed (article 48, para. 1).

70. His delegation supported in principle the inclusion of appropriate third-party dispute settlement procedures as an integral part of the draft. In view of the reservations expressed by some States, however, the proposal to make part three, on settlement of disputes, subsidiary to already existing procedures and mechanisms in that area should be discussed further.

71. Mr. MOMTAZ (Islamic Republic of Iran) said that by adopting on first reading the draft articles on State responsibility the Commission had taken a decisive step in its consideration of a very important topic. Since there had been no time to study the proposals in detail, his delegation would confine itself to some general comments.

72. With regard to the legal consequences of an international crime committed by a State, the Commission had been right to maintain the distinction between delicts and crimes. The Commission's new approach to the problem of deciding before which organ and on what legal basis a State could be accused of an international crime seemed reasonable, but the trouble with the choice of the Security Council and the General Assembly as the organs responsible for characterization of an international crime was that, as in the past, they might take a complaisant attitude towards extremely serious wrongful acts, and moreover their competence was limited by the Charter. Any new powers would require a revision of the Charter, which hardly seemed possible in the present circumstances. The Iranian delegation's preference was for the International Court of Justice; the Commission's argument that the characterization could be effected within the framework of part three of the draft articles therefore seemed entirely acceptable. The analogy of jus cogens treatment by article 66, subparagraph (a), of the Vienna Convention on the Law of Treaties was a striking one, and the International Court was perfectly capable of assuming responsibility for the characterization of international crimes.

73. A second problem concerned the juridical effects which could arise from the characterization. Since it was now accepted that the perpetration of such internationally wrongful acts harmed not one State but all States, his delegation could support article 40, paragraph 3. And since the distinction between delicts and crimes naturally entailed specific consequences, it was appropriate to devote a whole article to the issue; however, article 52 and the commentary thereto called for some comment. The consequences of a crime must never jeopardize the territorial integrity or political independence of the State committing the crime, and the matter was so important for the maintenance of international peace and security that those exceptions must be expressly stated. It was also essential to prevent the consequences affecting all the citizens of the State committing the crime: article 53, subparagraph (b), for example, might have implications for the State's population. The obligations set out in article 53 amounted in fact to minimum collective consequences altogether in keeping with general international law and the recent practice of the Security Council. The article had the advantage of not proceeding by analogy and keeping to a minimum the criminal implications of the term "international crime".

74. Turning to the draft articles on countermeasures, he said that the Commission's work on the question of circumstances precluding wrongfulness had generated a number of apprehensions: for example, as to whether the codification of law in that field might not legitimize countermeasures as tools of hegemonistic actions by some Powers; and whether such measures would have the undesired effect of poisoning relations between the parties to the conflict. However, in an international community which lacked mechanisms for the application of law, States could not be denied the right to react to violations of international law by having recourse to countermeasures. Such recourse must therefore be regulated and the weakest States offered guarantees against abusive treatment. While all States were regarded as injured by the commission of an international crime, only the "effective victim" was entitled to recourse to countermeasures. The notion of "effective victim" had been upheld by the International Court of Justice in connection with its 1986 Judgment in the Nicaragua case, rejecting all claims by certain States that they were carrying out a so-called "actio popularis" on behalf of the international community, but without an express mandate. That limitation warranted further study by the Commission.

75. The draft articles on countermeasures seemed on the whole consistent with the approach based on the unequal capacity of States to take countermeasures and they had his delegation's general support. Article 34, on self-defence, was appropriate, but it must be remembered that in connection with its 1986 decision the International Court had stated that the lawfulness of a reaction to aggression depended on respect for the criteria of necessity and proportionality of the self-defence measures.

76. The draft articles did not require that countermeasures should be reciprocal or that they should necessarily be taken with respect to the same obligation or the same type of behaviour as the ones underlying the wrongful act. The absence of such a requirement opened up a broad range of possible countermeasures available to injured States in a disadvantageous economic situation in relation to the wrongdoing State. That approach was consistent,

for example, with the dispute-settlement rules and procedures annexed to the Agreement of 15 April 1994 establishing the World Trade Organization.

77. In its future work the Commission should give priority to the topic of State responsibility. It was to be hoped that the new Special Rapporteur would be able to complete his task and that the Commission would adopt the draft articles on second reading.

78. Mr. VASSYLENKO (Ukraine) said that his delegation welcomed the completion on first reading of the draft articles on State responsibility, which should now be submitted to Governments for comment.

79. The provisions concerning the consequences of acts characterized as international crimes deserved particular attention. The concept of an international crime was deeply rooted in contemporary positive law, and the distinction between crimes and delicts was a qualitative one between ordinary wrongful acts and serious wrongful acts which damaged the fundamental interests of the international community. In its treatment of this difference the Commission had taken an important step in the right direction, even though article 52 failed to spell out clearly the specific forms of responsibility for international crimes. The problem was difficult but must be solved, for otherwise the value of a future legal instrument on State responsibility would be considerably diminished. The draft articles also lacked any clear provision on the criteria for determination of the extent of the damage inflicted on an injured State or for establishing the degree of responsibility of the wrongdoing State.

80. The Commission had taken another important step by adopting the provisions on countermeasures contained in part two of the draft articles and confirming the difference between countermeasures and responsibility as such. However, it would have been better to locate those provisions at the end of part three, on settlement of disputes, or even in a separate part four. Countermeasures were a specific unilateral means of coercive settlement taken against a State which refused to fulfil the obligations arising from its responsibility and seek an amicable settlement of the dispute. It was therefore illogical to place the countermeasure provisions between the provisions on responsibility for ordinary international delicts and those on responsibility for international crimes. The draft articles should also include provisions on collective countermeasures taken through international organizations. Such a move would be consistent with international law and practice and with the logic of article 19. Furthermore, the well-established term "sanctions" would be preferable to the term "countermeasures".

81. Ukraine attached great importance to the amicable settlement of disputes caused by internationally wrongful acts and it supported in principle the dispute-settlement system set out in part three of the draft articles. The Commission should now make an extra effort to improve the text so as to avoid any disadvantages to weaker States.

82. His delegation commended the work done by the Commission on the draft Code of crimes and it agreed with those countries which believed that the Code should be adopted as a multilateral treaty. The Commission's decision to include only

offences generally regarded as crimes against the peace and security of mankind was welcome, particularly the inclusion of crimes against United Nations and associated personnel. However, before its final adoption the text of the draft Code must be harmonized with the draft articles on State responsibility and the draft statute of an international criminal court. A cautious approach must be taken to the provisions of the texts concerning the list of crimes and their definitions, and a distinction must be maintained between crimes committed by individuals but linked to international crimes committed by a State and those crimes which might fall within the jurisdiction of an international criminal court but had nothing to do with a State's behaviour. Moreover, some of the crimes defined in one text were omitted from or defined differently in another, and sometimes different terms were used for similar notions or phenomena.

83. Ms. STEAINS (Australia) said that her delegation greatly valued the Commission's work on the codification and progressive development of the topic of State responsibility. Referring to chapter IV of part two of the draft articles on the subject, she agreed with the remarks made by the representative of the United Kingdom that the controversial concept of "State crimes" had failed to gain broad international acceptance. Her delegation had already expressed reservations about including the articles on State crimes in the draft articles. It was a concept fraught with difficulties; for example, under draft article 40, paragraph 3, where an "injured State" included all other States if the internationally wrongful act constituted an international crime. The concept of international crimes should be eliminated from the discussion of State responsibility and the Commission should focus instead on the question of responsibility for delicts.

84. Her delegation welcomed the Commission's work on countermeasures and the settlement of disputes. In particular, chapter III of part two, on countermeasures, was a valuable summary of State practice in that area. Its provisions struck a fair balance between the interests of the injured State and those of the wrongdoing State.

85. Mr. PASTOR RIDRUEJO (Spain) said that his delegation had always believed that the distinction between delicts and crimes existed not only in the doctrine but also in the sociology of international relations. The reaction of the international community to a mere failure to comply with a clause in a trade treaty was different from its reaction to a serious violation of human rights. The concept of international crimes ennobled the draft articles and the whole regime of international responsibility, although States which viewed international relations from the standpoint of power interests found the concept an awkward one. The specific consequences of an international crime should be particularly severe and include an actio popularis and the imposition of sanctions. The seriousness of those consequences entailed the establishment of institutional guarantees, particularly mandatory recourse to jurisdictional organs, for otherwise the notion of an international crime would be subjected to political manipulation and become a source of discord between States.

86. Accordingly, the Commission was right to maintain the idea of actio popularis in article 40 and to attach other specific consequences to international crimes, even though the draft articles did not envisage the imposition of sanctions. The question of whether an international crime had

been committed was subject to the general system for the settlement of disputes contained in part three, which, except in the case of countermeasures, did not provide for obligatory recourse to jurisdictional settlement. However, if a State could be charged with an international crime unilaterally by the allegedly injured State, and unless the draft articles established obligatory recourse to a jurisdictional mechanism, the way would be opened up for political manipulation, and the notion of an international crime would not help to preserve the peace. Provided that institutional guarantees were established, the Spanish delegation could support the two-stage procedure described in the commentary to article 51. But the Commission had not included that system in the draft articles, thus giving rise to serious concerns about the perverse effects of the concept of an international crime.

87. It was impossible to ignore the risks involved in the draft articles on countermeasures, for their effectiveness depended on the different levels of power of States and their implementation might give rise to a chain of actions and reactions which would not help to solve the dispute. However, the Commission's inclusion of countermeasures was justified for two reasons: for some time international customary law had been laying down criteria on countermeasures; and, with or without codification of countermeasures, States would continue to resort to countermeasures. Accordingly, detailed regulation of countermeasures could help to offset some of the risks, especially if an obligatory jurisdiction was established. The general lines of the system adopted by the Commission seemed correct.

88. Turning to the draft articles on settlement of disputes, he said that, except in the case of countermeasures, no provision was made for a mandatory jurisdiction for the settlement of disputes arising from the future convention. Although that major omission was due to the praiseworthy desire to secure the greatest possible acceptance of the future convention, the Spanish delegation would have been able to accept for the whole of the draft text obligatory recourse to jurisdictional means of dispute settlement. It was not for nothing that Spain had signed the unilateral declaration on the compulsory jurisdiction of the International Court of Justice provided for in article 36, paragraph 2, of its Statute.

The meeting rose at 1.05 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

Official Records

SIXTH COMMITTEE
37th meeting
held on
Monday, 11 November 1996
at 3 p.m.
New York

SUMMARY RECORD OF THE 37th MEETING

Chairman:	Mr. ESCOVAR-SALOM	(Venezuela)
later:	Ms. WONG (Vice-Chairman)	(New Zealand)

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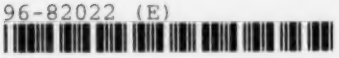

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

1. Mr. OMAR (Libyan Arab Jamahiriya), referring to the draft articles on State responsibility contained in chapter III of the report of the International Law Commission (A/51/10 and Corr.1), said that his delegation was dissatisfied with the form and substance of article 39, ("Relationship to the Charter of the United Nations") because it conflicted with the other draft articles on State responsibility, and with other provisions of international law. The words "as appropriate", for example, were incompatible with the draft articles in general and with those on the settlement of disputes in particular. The article was superfluous and should be deleted, as the relationship between the draft articles and the Charter was governed by Article 103 of the Charter. The powers of the Security Council were defined clearly in the Charter, and his delegation shared the view that the Security Council should not, as a general rule, deprive a State of its legal rights or impose upon it obligations beyond those arising out of the Charter and international law.

2. In connection with articles 47 to 49, his delegation believed that the right of injured States to take countermeasures should be invoked only as a last resort after all reasonable and peaceful means of dispute settlement had been exhausted. It supported article 50, concerning prohibited countermeasures, and in principle had no objection to embodying the draft articles on dispute settlement in the text as a whole. It would comment further on the subject at the appropriate time.

3. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

4. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapters IV, V and VI of the Commission's report and referring first to chapter IV on State succession and its impact on the nationality of natural and legal persons, said that the Special Rapporteur for the topic had submitted a second report, so that the Commission now had all the necessary materials for dealing with the nationality of physical persons. The Special Rapporteur had also outlined the scope and complexity of the question of the nationality of legal persons and had reiterated his view that at the current stage it would be preferable for the Commission to focus on the nationality of natural persons. He had further suggested that the question of the continuity of nationality should be considered in the framework of the topic of diplomatic protection and that the results of the work on the topic as a whole should take the form of a declaration of the General Assembly.

5. The Commission had established a Working Group to consider the problem of the nationality of legal persons, the form which the results of the work should take, and the calendar of work. The Working Group had also studied the question of the nationality of natural persons, including the structure of a possible future instrument and the main principles to be included therein. The results of that preliminary work were described in paragraphs 85 to 87 of the report.

6. Since the Working Group's recommendations had been approved by the Commission, the General Assembly might take note of the completion of the preliminary study and request the Commission to undertake the substantive study of the topic, on the understanding that: consideration of the nationality of natural persons would be separated from that of the nationality of legal persons and given priority; for present purposes - and without prejudicing a final decision - the Commission should draft a set of articles with commentaries on the nationality of natural persons, which would constitute a declaration of the General Assembly; the Commission should complete its first reading of the draft articles at its forty-ninth or, at the latest, its fiftieth session; and it would then decide how to deal with the question of the nationality of legal persons, in the light of the observations of States. In paragraph 24 of the report the Commission invited such observations on the proposed approach.

7. Turning to chapter V of the report, on international liability for injurious consequences arising out of acts not prohibited by international law, he said that the parameters of that complex topic went far beyond the traditional notions of domestic jurisdiction and territorial sovereignty. In 1992, the Commission had finally decided to concentrate on the international effects of lawful activities which might cause significant harm beyond the boundaries of the country in which they took place and to draw up a set of articles on arrangements for preventing such harm. At its latest session the Commission had decided that it was time to submit to the Sixth Committee and to Governments an overview of the subject and to invite their comments, so that in 1997 it would be able to decide what direction its work should take.

8. The Commission had established a Working Group which had considered three of the most important points: the activities to be covered, prevention, and compensation or other relief. The Commission had not had time to consider the Working Group's report and had decided to annex it to its own report. The Working Group had started from the principle that there were essentially two elements to be taken into account: the prevention, in the broadest sense of the term, of transboundary harm arising from activities not prohibited by international law, and compensation for transboundary harm. It was assumed that there was nothing to prevent a State from engaging in activities not prohibited by international law, even if such activities could cause harm beyond national frontiers, but that its liability might be triggered even if the activities were characterized as lawful. One particularly important principle was that the victim of transboundary harm should not be left to bear the entire loss.

9. The Working Group had proposed 22 draft articles, divided into three chapters. Most of the provisions contained in chapter I (General Provisions) and chapter II (Prevention) had already been adopted by the Commission. In paragraph (26) of the general commentary the Commission requested comments from Governments on article 1 (b), which dealt with activities which did not involve a risk of causing significant transboundary harm but nonetheless caused such harm. The obligations established by the articles on prevention were fairly light, for they addressed only liability leading to compensation or other relief.

10. The draft articles on compensation or other relief (chapter III) were new and went to the heart of the topic. The commentary discussed the theory which

served as the basis for establishing liability and the obligation to provide compensation or other relief. The draft articles did not incorporate the principle of "objective" or "absolute" liability, which had been developed in international law with regard to some activities but not for many others. In both international and domestic law the principle of justice and equity required that the victim of harm caused by someone else's activity must be compensated. Chapter III offered two means of relief: by an action before the courts of the State in which the harm originated, or by requesting the initiation of negotiations between that State and the State or States where the harm was suffered. Of course, that did not prevent the parties from agreeing on some other formula or the courts of the States where the harm occurred from exercising their jurisdiction. Such jurisdiction could derive from the principles of private international law, in which case the draft articles need not come into play.

11. The Commission would welcome comments on all the draft articles, and in particular on the matters referred to in paragraph 25 of its report. At the time when the Commission had included the topic in its programme of work, some of its members and some members of the Sixth Committee had thought it was presumptuous to venture into an area where many States considered that they had absolute freedom of action. But that position was no longer defensible in the light of what the International Court of Justice had said in paragraph 29 of its 1996 advisory opinion on the legality of the threat or use of nuclear weapons, to the effect that the general obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control was now part of the corpus of international law relating to the environment.

12. With regard to chapter VI of the report on reservations to treaties, he said that the Commission had decided, for lack of time, to consider the Special Rapporteur's second report at its next session. The report was divided into two chapters, followed by a bibliography on reservations. Chapter I offered an overview of the Special Rapporteur's study, while chapter II dealt with the question of the unity or diversity of the legal regime of reservations to treaties and more particularly the question of reservations to human rights treaties. The Special Rapporteur offered some conclusions and proposed a draft resolution on reservations to normative multilateral treaties, including human rights treaties. The Commission requested all States to reply to the questionnaire drawn up by the Special Rapporteur, which the Secretariat had circulated in 1995 and to which as yet only 19 States had replied.

13. Mr. CEDE (Austria) said that the topic of State succession and its impact on the nationality of natural and legal persons was an urgent one, owing to both its political implications and its significance for individuals. Since a statement dealing in detail with the vast amount of material on the topic would go beyond the time available to the Committee, his delegation would confine itself to certain basic ideas; its detailed comments were set out in an annex to the text of his statement, which would be circulated to all delegations.

14. The Commission had rightly decided that the nationality of natural persons should be discussed separately from that of legal persons, a suggestion made a year ago by his delegation, which also supported the idea of a non-binding

declaration of the General Assembly consisting of articles and commentaries. A convention which had not come into force might perhaps have more persuasive force, but a declaration was authoritative for all States in equal measure, whether they had voted for it or not, even though its true authority would stem not from its form but from its content. A declaration also had a certain legalizing effect since an action in conformity with it enjoyed the presumption of lawfulness. A problem might arise if the General Assembly altered the draft articles because then the commentary would have to be altered as well - something which did not happen in the case of a convention. The experience relating to declarations of the General Assembly had demonstrated their impact on relations among States, and it should be noted that the International Court of Justice had resorted to declarations as evidence of the opinio juris of the community of States. Other bodies had also felt the need to deal with the topics under consideration. The European Commission, for example, had recently concluded its work on a declaration on the consequences of State succession for the nationality of natural persons. The existence of that document illustrated the importance of closer coordination among international bodies dealing with identical issues.

15. The topic had an impact on individuals and on relations between States. The rules should thus be formulated in terms of human rights applicable within national jurisdictions or of rules applicable in inter-State relations. Even if a mixture of norms became unavoidable, their enforcement procedures would remain different. Only the injured State would be entitled to cite non-compliance with a rule by another State. In the case of human rights, however, the injured State was hardly discernible, so that the norm would be ineffective unless an enforcement mechanism was provided. In the absence of such a mechanism, the rules must be formulated in a way that made them applicable in inter-State relations. For example, the human rights rules should make the grant of nationality a duty of States but not one which an individual could invoke directly. Such an approach would satisfy the basic principle that nationality did not flow directly from international law but from national law.

16. The broader the topic, the more difficult it was to reach agreement on it. The Commission should therefore restrict the content of the topic to a minimum and not take up matters which did not need to be regulated. His delegation supported the approach envisaged by the Working Group: the instrument should be divided into two parts, the first containing general principles concerning nationality in all situations of State succession, and the second containing rules on specific situations. However, that approach was only a starting point and might have to be changed or abandoned in the future.

17. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, it was necessary to bear in mind the linkage between that topic and the topic of State responsibility. At an early stage his delegation had voiced concern over the direction taken by the Commission's first drafts on the topic of international liability, which had already been addressed in a number of conventions. The Secretariat's survey of liability regimes established by earlier instruments demonstrated that despite the difficulties involved it was worthwhile to seek commonly acceptable legal rules in that area. The task of regulating the potentially detrimental external effects of intensive industrial activities not prohibited by international law

and finding a balance between the profits derived from such activities and the burden caused to third parties could be achieved in various ways, such as through the polluter-pays principle, which was not applicable in all cases, or through a regime of civil or State liability or through a combination of both. The duty of compensation arising out of such liability could be performed directly by the operator or by means of a two- or three-tier system based on the establishment of a compensation fund and another means. However, only articles 5 and 21 of the current draft were devoted to the codification of international liability. Moreover, the text contained no provisions concerning the nature of the liability or the measure of compensation and also failed to make any distinction between the concepts of responsibility and liability.

18. Concerning article 1, his delegation believed that activities other than those involving a risk of causing significant transboundary harm should be included, for otherwise the possibility of relief for third party damage caused by industrial emissions or exhaustion from combustion engines, for example, would be excluded. A further omission was the failure to define the term "significant boundary harm", which was pivotal to the whole regime. That omission was all the more significant because article 21 referred merely to negotiations, making no provision for mandatory judicial settlement of claims. In that connection, paragraph (4) of the commentary to article 2 was neither a substitute for a prescription, nor helpful for operational determination. In the event that a definition was unattainable, provision should be made for a procedure which went further than mere negotiations.

19. In the light of such considerations, his delegation believed that the Commission should approach the draft articles as a text concerning an environmental protection regime rather than international liability. If the Commission decided to pursue its current approach to the text, he suggested that it should concentrate on formulating a few basic principles governing an environmental protection regime with a view to their adoption as a non-binding instrument by the General Assembly, a procedure in keeping with article 23, paragraph 1 (b), of the Commission's statute. It would be a futile and time-consuming exercise to draft detailed articles that were intended to serve as the basis for a convention.

20. Turning to chapter VI of the Commission's report, he emphasized the fundamental importance of the question of the unity or diversity of the legal regime of reservations to multilateral treaties and of the effects of reservations, acceptances and objections. His delegation had repeatedly expressed the view that the legal regime governing reservations should be kept uniform and agreed that there should be no special regime for normative and, in particular, human rights treaties. It therefore supported the Special Rapporteur's endeavour to base his future work on his conclusion that the "Vienna regime" was generally applicable. In connection with the conditions for the permissibility and/or opposability of reservations, it was essential to address the basic difference between the two doctrines. His delegation strongly supported the permissibility doctrine, but where the permissibility of reservations was questionable due to the vagueness of the formulation, it proposed that States should engage in a dialogue with the reserving State after raising a "preliminary objection", thus providing the latter with the opportunity to clarify or demonstrate subsequently its intention to fulfil its

obligations in conformity with the object and purpose of the treaty. Such a procedure would also enable the objecting State to reserve its position without being bound by acquiescence, although his delegation nevertheless felt that the twelve-month rule was inapplicable to impermissible reservations which were invalid ab initio. In its view, application of the permissibility doctrine was the only means of ensuring the erga omnes effect of the impermissibility.

21. His delegation also shared the Special Rapporteur's strong opinion that treaty monitoring bodies should have the power to determine the permissibility of reservations to treaties which they were monitoring, even if such power was not expressly vested in them by treaty provisions, as they could not properly fulfil their monitoring function without being aware of the exact scope of the obligations undertaken by a treaty party. In cases where a treaty monitoring body determined that a reservation was null and void, it should give the reserving State the opportunity to withdraw or reformulate the reservation, or to declare its withdrawal from the treaty with a view to respecting consensuality. In the latter instance, it would be necessary to address the issue of whether the withdrawal would have effect ex nunc or ex tunc. It would also be necessary to establish a new procedure whereby a State could reformulate its reservation in order to make it permissible or even make a new reservation after ratification. His delegation further suggested that the Special Rapporteur should consider the matter of clarifying the notion of "object and purpose of a treaty", as that was the criterion on which the permissibility of a reservation depended. Lastly, it regarded the resolution proposed by the Special Rapporteur on reservations to normative multilateral treaties, including human rights treaties, as an interesting, if unusual, approach to the work. However, it wished to reserve its position until the Commission completed its discussion of the draft resolution in 1997.

22. Mr. LALLIOT (France) said that the topic of State succession and its impact on the nationality of natural and legal persons involved an analysis of the respective roles of internal and international law in granting nationality. It had been rightly pointed out that identification of the nationals of a State was a matter for internal law, even in cases of State succession. Customary law in that regard was reflected in article 1 of the Hague Convention of 12 April 1930. Restrictions on the freedom of States to grant nationality were thus very limited. The Special Rapporteur's second report (A/CN.4/474 and Corr.1 and Corr.2 (Chinese only)) sometimes confused existing law (lex lata) and the law as it should be (lex ferenda). It was important to distinguish clearly between mere codification and the progressive development of the law.

23. Any limitations on the freedom of States to grant nationality had their basis in treaties, which were fairly cautious in that regard. There was currently no universal convention setting forth a general right to nationality, although article 24, paragraph 3, of the International Covenant on Civil and Political Rights provided that "every child has the right to acquire a nationality" and article 15, paragraph 2, of the Universal Declaration of Human Rights provided that "no one shall be arbitrarily deprived of his nationality". In considering whether the successor State had an obligation to grant its nationality to its inhabitants, the Commission should take account of the current state of the law. In any case, the solutions ultimately adopted must show scrupulous respect for human rights. As no obvious solution was available,

one of the basic objectives of the study undertaken should be to formulate a comprehensive inventory of State practice. While his delegation had no objection in principle to according priority to the question of the nationality of natural persons, it wished to point out that the question of the nationality of legal persons also gave rise to a number of important problems that must be addressed.

24. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law his delegation was surprised at the procedure adopted by the Commission in submitting the draft articles, which had not been considered by the Drafting Committee or debated fully in plenary. It would have been better to postpone their consideration until the next session.

25. The definition of harm caused to the environment brought together disparate elements and was not yet satisfactory. The emphasis should be placed on the harm, rather than on the means of relief. Article 5 indicated the general principle underlying the draft articles, establishing that liability arose from significant transboundary harm caused by an activity referred to in article 1 (namely, an activity not prohibited by international law) and gave rise to compensation or other relief. However, the Working Group had not defined the characteristics of that liability. The liability of the State could be conceived only residually vis-à-vis the liability of the operator of the activity at the origin of the transboundary harm. Recognition of the residual liability of States for harm caused by lawful activities would itself constitute a very considerable development of international law. States would be unlikely to accept such a development in a general form. To date, they had accepted it only in specific treaties such as the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972. There, however, the States originating the Convention had considered space activities as activities reserved exclusively to States, which would clearly not be the case for all the activities envisaged in the draft articles under consideration. It would therefore be preferable to make the draft articles a sort of compendium of principles, to which States could refer when establishing specific regimes of liability. That would be a realistic, pragmatic and constructive approach to the topic.

26. On the topic of reservations to treaties, his delegation shared most of the views and many of the concerns expressed by the Special Rapporteur in his prudent and pragmatic report. At the fiftieth session, his delegation had indicated France's attachment to the reservations regime established by the relevant provisions of the 1969 and 1986 Vienna Conventions on the law of treaties, to which it was not, however, a signatory. France had not signed the 1969 Vienna Convention on the Law of Treaties because it contained provisions declaring void treaties conflicting with a peremptory norm of general international law (jus cogens). The pacta sunt servanda principle on which the law of treaties rested was thus in danger of being undermined by abusive invocation of alleged norms of jus cogens, the content, means of formation and effects of which were still undefined. It was for the same reason that France had not signed the 1986 Vienna Convention or the 1978 Vienna Convention on Succession of States in respect of Treaties. While regretting that the authors

of those Conventions had deviated from customary international law on certain matters, France nevertheless considered that the rules concerning reservations contained in the 1969 Vienna Convention functioned fairly well and that the system established in 1969 must not be abandoned in favour of positions adopted by some international human rights bodies concerning the allegedly special case of human rights treaties. Those positions deviated too much from the generally accepted rules of international law and might hamper the development of the protection of those rights through treaties, by discouraging States from becoming parties thereto. It was in any case always possible, when negotiating each treaty, to ensure that rights considered as essential were not subject to derogation. Not all reservations lacked legitimacy and there was no need to draw a distinction between human rights treaties and other treaties. It was neither necessary nor desirable to establish a special regime of reservations for human rights treaties.

27. The Special Rapporteur had rightly pointed out that the establishment of monitoring machinery by many human rights treaties created special problems that had not been envisaged at the time of the drafting of the aforementioned conventions, connected with determination of the permissibility of reservations formulated by States. In his delegation's view, the monitoring bodies could in no circumstances determine the permissibility of those reservations. It was for the reserving State to draw the conclusions with regard to the incompatibility of its reservation with the object and purpose of the treaty, and for the State objecting to the reservation to draw the conclusions with regard to its decision concerning the maintenance of the treaty link between itself and the reserving State. As for the view that a monitoring body was particularly well placed to determine the compatibility of a reservation with the object and purpose of the treaty, the body in question owed its existence only to the treaty and had no powers other than those conferred on it by States parties; it was thus for the States parties alone, unless the treaty provided otherwise, to decide on the incompatibility of a reservation with the object and purpose of the treaty.

28. It had been claimed that the provisions of certain international conventions that represented rules of customary international law could not be the subject of reservations. His delegation wished to point out that international custom was evidence of a general practice accepted as the law. Unfortunately, where human rights were concerned, it was difficult to identify practices that conformed strictly to that definition. It would be premature, to say the least, to claim that all such practices conformed to that definition of international custom. Furthermore, even if one accepted that some human rights treaties formalized customary principles, the duty of a State to comply with a general customary principle and its acceptance to be bound by its expression in a treaty must not be confused. Lastly, the concept of a "customary rule" was not synonymous with a "peremptory norm of international law". The uncertainties surrounding the concept of jus cogens must not be allowed to compound those concerning the place of custom in human rights matters.

29. France considered that reservations, as governed by the 1969 Vienna Convention, were a normal and legitimate means of formulating a State's consent to be bound by a treaty, if applied in accordance with the conditions set forth therein. A State that had qualified its consent by entering reservations in accordance with international law thus had no need to subject itself to any

conditions, constraints or procedures other than those arising from the law of treaties or the instrument in question. By permitting compatibility between constitutional and treaty norms and the adaptation of treaty rules to individual internal laws, reservations promoted wide acceptance by the international community of a number of treaties that would otherwise never gain the requisite number of accessions. In practice, reservations were the prerequisite for ensuring such compatibility. The validity of reservations could be assessed only in the light of the object and purpose of the treaties, and there was no reason to refer to other, more subjective considerations. The Commission should not risk destabilizing a system that functioned in a satisfactory manner by calling into question the relevant provisions of the Vienna Conventions. Lastly, the draft resolution that the Special Rapporteur had appended to his report was prudent, but nonetheless raised a few difficulties which should be discussed at the fifty-second session.

30. Mr. AL-BAHARNA (Bahrain) said that the statement by the Special Rapporteur contained in paragraph 13 of his second report on State succession and its impact on the nationality of natural and legal persons to the effect, that while nationality was essentially governed by internal law, international law imposed certain restrictions on the freedom of action of States, struck a reasonable balance between the sovereign right of a State to pass nationality laws and the right of an individual to a nationality under international law. The Commission's work on that topic should highlight its human rights aspects, protecting individuals from detrimental effects such as statelessness resulting from nationality legislation passed in the process of State succession. With respect to working methods, his delegation supported the Special Rapporteur's recommendation that the Commission should adopt a flexible approach involving both codification of international law (inasmuch as fundamental human rights were involved) and its progressive development (as far as matters of succession of States were concerned). As to the form which the outcome of work on the topic might ultimately take, the proposal to elaborate a declaratory instrument in the form of articles accompanied by commentaries appeared to have widespread support.

31. His delegation supported the Special Rapporteur's pragmatic proposal to retain the definition of certain basic concepts contained in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The study of the categories of succession should be based on the 1983 Vienna Convention. That should not rule out the possibility of adding further classifications that might be relevant to the specific problems of nationality. Basically, however, the definition of the term "succession of States" contained in the 1978 and 1983 Vienna Conventions should be retained.

32. The issue of the individual's right to nationality should constitute the heart of the topic under consideration. That right reposed on article 15 of the Universal Declaration of Human Rights, the effect of which was to restrict statelessness and to confer on individuals the right to retain or change their nationality. Its restrictions should be binding on the predecessor and successor States. His delegation agreed with the Special Rapporteur that the right of option required further clarification, and that although the Commission should endeavour to strengthen the right of option, there could be no

unrestricted free choice of nationality. The obligation to negotiate with respect to nationality issues affecting nationals of predecessor and successor States should also be at the heart of the study. That obligation should, however, be balanced by consideration of the problems that might arise from negotiations, and in particular, of the fact that they might drag on for years before the problems of the transfer of nationality were resolved satisfactorily, with statelessness on a massive scale emerging in the meantime.

33. Concerning the principle of non-discrimination in the granting of nationality, his delegation fully supported the Commission's conclusion that it was totally unacceptable that States should apply such criteria as ethnicity, religion, gender or language in refusing to grant nationality to categories of persons who would otherwise be entitled thereto.

34. His delegation welcomed the Commission's practical approach to the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and urged Governments to respond to the Commission's request for comments on the draft articles contained in annex I to its report, particularly on paragraph (26) of the commentary to article 1 and the issue of compensation or other relief as set out in chapter III. He noted that the Working Group had decided, in view of the recommendations in General Assembly resolution 50/45, to present its report to the Commission in the form of a complete set of draft articles, including the articles in chapters I and II, which had been provisionally adopted by the Commission on first reading. The Commission would therefore be in a position to make a fully informed decision at its next session about how to proceed in the future. His delegation believed that the draft articles provided the necessary framework for the completion of work on the topic and supported the Commission's recommendations on its future approach contained in annex I.

35. He agreed with the Working Group that there was a clear distinction between State responsibility and State liability; in the draft articles concerning the latter, the State of origin was only permitted to pursue activities "at its own risk". State liability was concerned with preventing transboundary harm arising from acts not prohibited by international law, in other words, preventing certain harmful consequences which fell outside the area of State responsibility. The draft articles were rightly based on the principle that, although States were not precluded from carrying out activities not prohibited by international law, they were liable to provide compensation or other relief to the victims of transboundary harm arising from such activities.

36. Mr. ROTH (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), welcomed the attention paid by the Working Group on international liability to the prevention of transboundary harm and the duty to pay compensation for harm caused. In the view of the Nordic countries, prevention should cover not only hazardous activities but also accidents and normal activities with unforeseen harmful effects. Although, according to article 8, the articles did not apply to transboundary harm arising from a wrongful act, the draft was replete with State obligations which, if breached, would seem to entail State responsibility. It was possible to imagine a case where unexpected harm occurred which entailed liability in itself; the harmful effects might then increase significantly if the affected State did not receive

timely notification, and, since the increased harm would then have been the direct consequence of a breach of duty, State responsibility would appear to be involved.

37. Turning to article 1, he said that the Nordic countries were of the view that, since it referred to "activities", the word "acts" in the title of the draft articles should be replaced by "activities". The Working Group had rightly chosen not to draw up a list of activities involving a risk of transboundary harm, as it was impossible to foresee all activities which might involve a risk in the future. He favoured removal of the square brackets from article 1 (b), as the draft articles should cover activities which caused transboundary harm despite involving no apparent risk. Although it could seem unfair to impose liability on States which had had taken due care, it would be even more unfair to leave a State which had had no part whatsoever in the harmful activity to bear the losses alone. To impose liability for unexpected losses would also provide a strong incentive for States and operators to take precautionary measures. As for the question of the scope of the obligations regarding harm under article 1 (b), the same principles should apply as for harm arising out of activities under article 1 (a).

38. The definitions in subparagraphs (a) and (b) of article 2 posed no problems, but there was a possible overlap between the criteria of territory, jurisdiction and control in subparagraphs (c) and (d), which it would be difficult for an instrument of the current type to resolve. In article 2 (d), the inclusion of the criterion "control over" meant that a State which illegally had control over a territory could be eligible for compensation, which was perhaps not the desired effect.

39. The basis for the obligations contained in chapter II could be strengthened by replacing "appropriate" with "possible" in article 4.

40. Article 5, on liability, needed to be more precise. It should be made clear in the text that not only persons and property but also the environment were protected. It was unclear from the text what exactly compensation was due for; as a minimum, compensation should be given for costs incurred. It also had to be made clear that it was primarily incumbent on the operator to provide compensation and that the liability of the State, if any, was residual.

41. Article 6 could be clarified somewhat by making explicit the duty of notification in cases where harm had occurred, even though that was implied in the duty to cooperate in good faith.

42. Article 7 would benefit from a provision to the effect that States must ensure that effective recourse was available in national courts; as it stood, there was no clear duty to do so.

43. Article 8, which revealed the residual nature of the proposed instrument, highlighted the difficulty in making a clear distinction between liability and State responsibility.

44. The important obligation of States to ascertain actively whether hazardous activities were taking place within their territory or otherwise under their

jurisdiction or control, as mentioned in the commentary to article 9, should be spelt out in the text.

45. The "assessment" required by article 10 should be replaced by the more specific "environmental impact assessment", prescribed in Principle 17 of the Rio Declaration on Environment and Development and now an accepted concept in international environmental law.

46. In article 13, it would be preferable to clarify that, where an assessment indicated a risk, notification should be provided before domestic authorization was given according to articles 9 and 10.

47. In article 15, the qualifier "whenever possible and by such means as are appropriate" was too vague and should be deleted. Also, in order to ensure that the information provided was the same as that given to potentially affected States, the article should use the same wording as article 13, and refer to "available technical and other relevant information on which the assessment is based".

48. It was certainly important to protect information which was vital to national security or industrial secrecy, but article 16 should reflect the view of the Working Group that there should be an element of proportionality, particularly when the harm originated in the business whose secrets were being protected.

49. Article 17 was to a large extent a codification of certain basic principles of good-neighbourliness. Paragraph 3 made it clear that completing consultations did not free the State of origin from liability and that it was obliged to take into account the interests of the affected State. A more comprehensive duty to settle disputes through a third party ought to be considered, especially as the procedure in the domestic courts of the State of origin, discussed in the general commentary to chapter III, was not explicitly evoked in the text.

50. Article 20 was a standard provision prohibiting discrimination, but it prescribed no duty for States to ensure a right of redress, nor even a right of access to effective national forums; that omission should be remedied.

51. The provision in article 21 that compensation should be negotiated "in accordance with the principle that the victim of harm should not be left to bear the entire loss" seemed at odds with of the natural presumption that the polluter should pay the entire loss, in the absence of circumstances warranting an adjustment. Furthermore, the dispute settlement obligation was very weak, which was a serious shortcoming that could be rectified, for example, by compulsory reference to the International Court of Justice or arbitration.

52. Subparagraphs (a), (b) and (c) of article 22 seemed to undermine the concept of liability for lawful acts. In particular, if subparagraphs (a) or (b) pertained, there would appear to be a breach of obligation, in which case there was a duty of reparation that went further than the liability envisaged in the draft articles. Subparagraphs (d) to (j) seemed reasonable when taken one at a time, but together they seemed to erode the "polluter pays" principle.

53. In conclusion, a considerable amount of work remained to be done on the draft text. As far as the Nordic countries were concerned, it was too early to decide whether to aim at a convention or a less ambitious non-binding instrument.

The meeting rose at 5.10 p.m.